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CASE NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1984

THE STATE OF GEORGIA,
Petitioner

V.

FORT FRASER FELKER, JR.,
Respondent

ON WRIT OR CERTIORARI TO THE
SUPREME COURT OF THE STATE
OF GEORGIA

PETITION FOR WRIT OF CERTIORARI

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Georgia in denying Petitioner's Application for Writ of Certiorari to the Court of Appeals of Georgia. Said Application before the Supreme Court of Georgia seeks review of the decision of the Court of Appeals of Georgia which reversed the Superior Court of Whitfield County's denial of Respondent's Motion to Suppress.

QUESTIONS PRESENTED

1. Whether the two-pronged test of ***Aguilar - Spinelli***[1] may be used for analysis in appellate review of the probable cause determination by the trial court, given the rejection of this anaylsis by the United States

1. ***Aguilar*** V. ***Texas***, 378 U.S. 108, 84 S.Ct. 1509, 12 L.E.Zd. 723 (1964)
Spinelli V. ***United States***, 393 U.S. 410, 89 S.Ct. 584, 21 L.E.Zd. 637 (1969)

Supreme Court and the focus of this anaylsis on the limited consideration of the other factors and evidence properly before the trial court in determining probable cause based on the totality of the circumstances under the Fourth Amendment of the United States Consitution.

2. Whether the appellate review of the totality of the circumstances in determining probable cause authorizes the appellate court to conduct a de nova finding of probable cause without deference to the determination and inferences drawn by the trial court in its finding of probable cause.

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CITATION TO OPINION BELOW

Felker v. ***State***, 172 Ga. App. 492,323 SE2d 819 (1984)
State v. ***Felker***, Georgia Supreme Court Case No. 41773

JURISDICTION

On September 10, 1984, the Court of Appeals of Georgia rendered a decision reversing the Superior Court of Whitfield County in its denial of the Respondent's Motion to Suppress Evidence. The State of Georgia, Petitioner herein, sought rehearing before the Court of Appeals of Georgia on September 19, 1984, which was denied on October 31, 1984. Petitioner made Application for Writ of Certiorari to the Supreme Court of Georgia on November 19, 1984. Said Application was denied by the Supreme Court of Georgia on January 7, 1985, Justices Marshall and Weltner dissenting. On January 23, 1985 the Supreme Court of Georgia denied the Petitioner's Motion for Reconsideration, Justice Marshall dissenting.

The Petitioner alleges jurisdiction of this Court to review the decision of the Supreme Court of the State of Georgia under the provisions of 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. 4.

STATEMENT OF THE CASE

Investigator Bruce Jordan of the Dalton Police Department became familiar with the respondent, Fort Fraser Felker, Jr., during the investigation of drug smuggling beginning in 1980. (Supp. Hearing T. 11). In 1982, the respondent was linked to suspects under investigation by the Presidential Special Task Force, DEA and FBI in a continuing investigation of drug smuggling. (Supp. Hearing T. 11). The respondent, owner of General Aviation located at Dalton Airport, had regualr contact with these suspects at the airport. (Supp. Hearing T. 11,12). Larry Steward, an employee of the respondent at General Aviation and who later bought out the maintenance department of General Aviation, was under Federal Indictment for his involvement in drug smuggling. (Supp. Hearing T. 12). Two other suspects, Russ Zilner (Zoellner), Jr. and Sr. had flown aircraft listed as "hot aircraft" by the DEA and U.S. Customs, into Dalton at the General Aviation hanger. (Supp. Hearing T. 12,13). The respondent had been present when these planes arrived. (Supp. Hearing T. 13). The investigator had seven pages of information in his file connecting the respondent with "proven known drug smugglers". (Supp. Hearing T. 12). Nineteen days before the respondent's arrest this investigator received information from another law enforcement agency that a plane had left Columbia and had been involved in a plane chase over the Carribean. (Supp. Hearing T.14). This plane had been followed to Dalton where it landed and was pulled inside the respondent's hanger. (Supp. Hearing T. 14). On January 10, 1984, the investigator had received a call from another agency concerning the drug smuggling investigation of General Aviation. (Supp. Hearing T.14).

On January 10, 1984, the investigator received a telephone call from a confidential informant at his residence at approximately 10:00 p.m. (Supp. Hearing T. 15; T. 5,6). This caller stated that the subject the investigator was looking for was presently at the airport in possession of the "stuff", drugs. (Supp. Hearing T. 15; T. 7). The investigator had known this informant for three and a half years and he had provided reliable information in the past. (Supp. Hearing T. 17). The investigator knew to whom and to what the informant was referring during this telephone conversation as he had talked with this informant quite frequently before this call. (Supp. Hearing T. 21).

Investigator Jordan contacted Ricky Swiney, a detective with the Whitfield County Sheriff's Department, and arranged a meeting at the intersection of Walnut Avenue and Airport Road. (Supp. Hearing T. 15,

38;T. 6,13). After this meeting they drove to the airport. (T. 7,13).

A datsun 280Z and a Volkswagen Rabbit were observed parked at General Aviation when they arrived at the airport. (Supp. Hearing T. 16,39; T. 7,14). While the area was being checked for other vehicles and anyone around the airport, Investigator Jordan and Sheriff Davis made a telephone call to the person who had previously given the information concerning the respondent. (Supp. Hearing T. 16; T. 8). During this call, the informant specifically named the respondent as the one at the airport and that he was in possession of cocaine. (Supp. Hearing T. 16; T. 8).

While Investigator Jordan was on the telephone, the respondent left the airport in the Datsun, followed by the Volkswagen. (Supp. Hearing T. 39; T. 8,14). When the vehicles reached the intersection of Airport Road and Walnut Avenue, the Datsun turned left on Walnut Avenue and the Volkswagen continued straight toward Dalton on Murray Avenue. (Supp. Hearing T. 39,40; T. 14). Detective Swiney followed the Rabbit after making radio contact with Whitfield County Deputy Donnie Lewallen to keep the Datsun under surveillance. (Supp. Hearing T. 40; T. 14, 15,21,22). The Rabbit was then followed to a residence on Van Buren Drive where a lady left the vehicle and entered the residence. (Supp. Hearing T. 40; T. 15).

Detective Swiney then left to go to the respondent's office on Pentz Street where the respondent had been followed by Deputy Lewallen. (Supp. Hearing T. 41; T. 15,16,22). Deputy Lewallen was already at this location and had set up surveillance. (T. 22). Detective Swiney arrived on Pentz Street and observed the respondent's Datsun and several people standing between the office and the Creative Arts Guild. (Supp. Hearing T. 41,42; T.16). As Detective Swiney circled around the block, the cars parked at this location began to leave, including the respondent's Datsun. (Supp. Hearing T. 42; T. 16,22,23). Again Deputy Lewallen followed the respondent's Datsun, while Detective Swiney followed another vehicle to determine who they were or if they were known drug violators. (Supp. Hearing T. 42,44; T. 16,22,23). Just prior to these vehicles leaving the area of the office, Sheriff Davis had radioed Detective Swiney that the respondent had drugs in his possession and to stop the car. (Supp. Hearing T. 42). When Deputy Lewallen informed Detective Swiney that the respondent was traveling south on Valley Drive, Deputy Lewallen was told to stop the respondent. (Supp. Hearing T. 43; T. 23,16).

When Detective Swiney arrived on Valley Drive, Deputy Lewallen had stopped the Datsun and obtained the respondent's driver's license. (Supp. Hearing T. 45; T. 17,23). Detective Swiney identified himself and informed the respondent that he was suspected of having cocaine in his possession. (Supp. Hearing T. 45; T. 17).

The respondent was placed at the rear of his Datsun where he stood with Detective Charles Hayes who had also arrived on Valley Drive. (Supp. Hearing T. 46; T. 17). During the search, Detective Swiney found a short straw with a white powder residue in the ashtray of the Datsun. (T. 18). While Detective Swiney was searching, the respondent kept moving around. (Supp. Hearing T. 47; T. 18). When Detective Hayes indicated that the respondent had dropped something on the ground, Detective Swiney reached down to recover what had been dropped. (Supp. Hearing T. 47; 18). Before Detective Swiney could pick up the object, the respondent reached down and picked up a glass vial. (Supp. Hearing T. 47; T. 18; State's Ex. No. 1, Item 1B-2). Detective Swiney also noticed that the respondent's pants were covered with a white powder residue. (Supp. Hearing T. 47; T. 18). In addition to recovering the glass vial from the ground, samples of leaves and groundcover were also taken from where the vial had been dropped on the ground. (Supp. Hearing T. 49; State's Ex. No. 1, Item 1B-7).

Detective Swiney informed the respondent that he was under arrest for the violation of the Georgia Controlled Substances Act, possession of cocaine. (Supp. Hearing T. 49,50; T. 18). The respondent told the Detective that he was a doctor and that he could possess cocaine if he wanted to and that he had more cocaine at his office. (Supp. Hearing T. 50).

The respondent's pants were removed at the Correctional Center and turned over to Tracy Jones, a Whitfield County Sheriff's Deputy assigned to the evidence section. (Supp. Hearing T. 50; T. 18,19,24,25). Deputy Jones inventoried the items removed from the pants pockets. (Supp. Hearing T. 50; T. 25). The following items removed from the respondent's pants pockets were sent to the Crime Lab for analysis: a plastic tube containing white powder residue (State's Ex. No. 1, Item 1B-1); a black pocketknife (State's Ex. No. 1, Item 1B-4) and a surgical knife (state's Ex. No. 1, Item 1B-5), both of which had white powder residue; a "4-way" nasal spray bottle (State's Ex. No. 1, Item 1B-3); five (5) zip-lock plastic bags containing white powder residue (State's Ex No. 1, Item 1B-6) and a clear plastic box containing tablets and capsules (State's Ex. No. 1, Item 1B-8). (T. 25,11). All of the items

recovered from the respondent's pockets were "Positive for cocaine"' except the white powder in the plastic bags which was "positive for ascorbic acid and menthol" and the pills and capsules which were not analyzed. (State's Ex. No. 1, p. 2).

A magistrate was then called and Detective Swiney made application for a search warrant by affidavit. (Supp. Hearing T. 52, State's Ex. No. 1 Supp. Hearing). A search warrant was issued for the respondent's office and a search for cocaine was conducted. (Supp. Hearing T. 53, State's Ex. No. 2 Supp. Hearing; T. 19,26). Seized in this search were two empty brown glass bottles and one brown glass bottle approximately half full of white powder. (T. 26). These bottles had pharmaceutical labels marked "Cocaine Hydrochloride Merck" (State's Ex. No. 1, Item 2A, T. 26). These bottles were recovered from a desk drawer in a room described as a "normal office" containing this desk and bookshelves. (T. 27). In addition to this room, the respondent's office contained a laboratory and several examining rooms. (T. 27). On one of the bottles the label was marked with lines and dates written in ink. (T. 26). The analysis of this evidence was "positive for cocaine" (State's Ex. No. 1,p.2).

The substance in the glass vial which was dropped by the respondent was analyzed as "positive for cocaine" and the white powder residue on the appellant's pants wre found to be "indicative of traces of cocaine". (State's Ex. No.1, p.2).

Prior to trial, the respondent filed a Motion to Suppress Evidence and a Motion to Quash Search Warrant and following a hearing before the trial court these motions were denied. (R.30-34, 27-29,40). The respondent's Motion to Suppress setforth as authority three (3) prior decisions which are interpretations of the Fourth Amendment of the United States Constitution; ***Draper*** v. ***United States***, 358 U.S. 307, 7 U.S. Ct. 329, 3 L.Ed 2d 327 (1957); ***Terry*** v. ***Ohio***, 392 U.S. 1, 88 S.Ct. 1968, 20 L. E2d 889 (1968); ***United States*** v. ***McCabeb***, 552 F. 2d 717 (6th Cir. 1977). (R30) Respondent setforth in said Motion the alleged violation of his rights "under the Constitution of these United States and of the sovreign [sovereign] State of Georgia." (R.31)

The Court of Appeal of Georgia in reversing the denial of the Respondent's Motion to Suppress by the Superior Court of Whitfield County, while recognizing the standard of review setforth by the United States Supreme Court in ***Illinois*** v. ***Gates***, _____U.S._____, 103 S.Ct. 2317, 76 L.E.2d 527 (1983).. continued its appellate focus upon the specific criteria of the ***"Aguilar-Spinelli*** rule" to the exclusion of the

entire evidence presented to the lower court.

The Petitioner sought review by the Georgia Supreme Court of the decision rendered by the Court of Appeals of Georgia by Writ of Certiorari. The Petitioner in seeking such review by the Georgia Supreme Court relied upon the recent decision of ***State*** v. ***Stephens***, 252 Ga. 181, 311 S.E.2d 823 (1984). In this decision by the Georgia Supreme Court "the rule of Illionis v Gates" became the interpretation of the proper standard of appellate review in determing probable cause. In seeking review upon Writ of Certiorari in the instant case, the Petitioner urged the Georgia Supreme Court to consider the effect upon the standard of appellate review the desicion of ***Massachusetts*** v. ***Upton***, ***SUPRA***, brought to the interpretation of the rule of ***Illinois*** v. ***Gates***. The Petitioner's Application of Writ of Certiorari was denied without opinion by the Georgia Supreme Court, Justices Marshall and Weltner dissenting. A Motion for Reconsideration was filed urging the Georgia Supreme Court to reconsider the issue raised by the interpretation of the rule of ***Illinois*** v. ***Gates*** by the decision of this Court in ***Massachusetts*** v. ***Upton***, U.S., 104 S. Ct. 2085, 80 LE 2d 721 (1984), and to clarify the standard of review either under the rights afforded by the Constitution of the State of Georgia or the United States Constitution. Said Motion for Reconsideration was denied by the Georgia Supreme Court, Justice Marshall, dissenting.

The Petitioner alleges herein, that the decision as rendered by the Court of Appeals and in effect, affirmed without opinion by the Georgia Supreme Court was based upon the rights granted to the Respondent by the United States Constitution, rather than the Constitution of the State of Georgia. The opinion rendered while making no reference to a specific source of rights is expressly written in terms of "the standard set forth by the United Staes Supreme Court in ***Illinois*** v. ***Gates***," and said standard is that of Federal Constitutional rights under the Fourth Amendment. Petitioner alleges jurisdiction in this Court upon the conflict of the instant decision of the Georgia Supreme Court in denying further review upon Certiorari of the continued use of the two-pronged test of ***Aguilar-Spinelli*** with the decision of this Court in ***Massachusetts*** v. ***Upton***, ***Supra***, under the interpretation of rights expressed within the Fourth Amendment of the United States Constitution.

REASONS FOR GRANTING THE WRIT

The instant petition before this Court presents an issue which seeks to address a conflict in the interpretation of the Fourth Amendment of the United States Constitution by the Georgia Supreme Court. The Georgia Supreme Court in denying the Application for Writ of Certiorari to the Court of Appeals of the State of Georgia has, in effect, affirmed without opinion the continued use of the rejected analysis of appellant review under the rule of Aguilar-Spinelli. The Court of Appeals of Georgia in its decision to reverse the trial court's finding of probable cause, improperly relied on the two-pronged test of ***Aguilar-Spinelli***. Such reliance is evident by the opinion's focus on the informant and the tip to the exclusion of other evidence which, when viewed in the context of the investigation, was substantial evidence of probable cause.

In ***Massachusetts*** v. ***Upton***, _____U.S._____, 104 S. Ct. 2085, 80 LE2d 721 (1984), this Court intended to put an end to the "hypertechnical" two-pronged test of ***Aguilar-Spinelli***.

> We did not merely refine or qualify the "two-pronged test". We rejected it as hypertechnical and divorced from "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. ***Brinegar*** v. ***United States***, 338 U.S. 160,69 S.Ct. 1302, 93 LE2d 1879 (1949).
>
> 104 S. Ct. at 2087

The continued use of this analysis, as present in the instant case, does not allow "significance to each relevant piece of information and balancing the relative weights of all the various indicia of reliability (and unrealiability) attending the tip." 104 S.Ct. at 2088. The use of the two-pronged test is further questioned in light of the circumstances of the respondent's arrest. This was an arrest, without a warrant, for the possession of cocaine based upon the officer's knowledge, experience, and determination that an arrest was necessary. In such a situation, the Court upon determining probable cause must consider all facts within the officer's immediate knowledge on which he based the arrest. "When a peace officer makes an arrest the standard means a reasonable cautious and prudent peace officer. The questions is what constituted probable cause in the eyes of a reasonable, cautious and prudent peace officer under the circumstances of the moment." ***Bell*** v. ***United States***, 102 U.S. App. D.C. 383, 254 F2d 82,86 (1958) cert. denied 358 U.S.

885, 79 S.Ct. 126, 3 L.E.2d 113 (1959)

It is the Petitioner's contention that the Court of Appeals of the State of Georgia in the instant case, in effect, conducted a de nova determination of probable cause and failed to grant any deference to the trial court's determination of probable cause in overruling the respondent's motion to suppress. This de nova determination did not occure by intent, but rather it is a natural product of the analysis required under ***Aguilar-Spinelli***. This is a problem illustrated by the analysis in the instant case, as well as, the analysis used by the Supreme Judicial Court of Massaschusetts in ***Commonwealth*** v. ***Upton***, 390 Mass. 562, 458 N.E2d 717 (1983).

The Petitioner concedes that a warrantless arrest must be justified by the circumstances confronting the law enforcement officer. Yet, after the officer's conduct has been determined by the trial court to have been based on probable cause, deference should be granted to the facts as found to establish probable cause. "Judging bits and pieces of information in isolation against the artificial standards provided by the two-pronged test" has promoted "hypertechnical" legal analysis over common sense. ***Massachusetts*** v. ***Upton***, 104 S. Ct. at 2088.

The instant petition presents an issue which addresses the jurisdicition grounds alleged herein. Although the respondent in his Motion to Suppress cites to Federal Standards and the violation of the United States Constitution, the Respondent also claims rights under the Constitution of the State of Georgia. The petitioner asserts that the language of the decision and the specific reference to the Federal Constitution standard of review must be considered as the interpretation of the rights afforded the respondent by the Fourth Amendment of the United States Constitution.

The Constitution of the State of Georgia provides in Article 1, Section 1, paragraph XIII;

> The right of the people to be secure in their persons, houses, paper, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall be issued except upon probable cause supported by oath or affirmation particularly describing the place or places to be searched and the persons or things to be seized.
> Georgia Constitution Article 1, §1, paragraph 13.

It has been stated in dissenting opinions of Justice Smith of the Supreme Court of Georgia that rejection of the present standard of

the Fourth Amendment analysis under the United states Constitution is possible under the Georgia Constitution. See ***LoGiudice*** v. ***State***, 251 Ga. 711, 715 n.6, 309 SE 2d 355 (1983); ***State*** v. ***Stephens***, 252 Ga. 181, 187 n.1, 311 SE2d 823 (1984). Yet there has been no such expressed departure from applicable Federal Constitution standards of this Court in the interpretation of the constitutional provision of the State of Georgia. As present in the instant decision, there is language of the Federal Constitutional standard of the Fourth Amendment with no distinction express between the federal or state constitutional claim of rights upon which the opinion may be rendered. As the opinion in the instant case is based upon the Fourth Amendment of the United States Constitution, it is clearly in conflict with this court's interpretation expressed in ***Massachusetts*** v. ***Upton***, supra.

CONCLUSION

The Petitioner respectifully moves this Court to issue a Writ of Certiorari to the Supreme Court of the State of Georgia to address the conflict present in the opinion below in rights under the Fourth Amendment of the United States Constitution.

Respectfully presented this the 23rd day of March, 1985.

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BANKE, Presiding Judge.

The appellant, a licensed physician, was convicted of possessing cocaine in violation of the Controlled Substances Act. On appeal, he contends both that licensed physicians are authorized as a matter of law to possess cocaine and that the cocaine which he was accused of possessing should have been excluded due to the alleged illegality of the search which resulted in its seizure.

Detective Jordan of the Dalton Police Department testified that the appellant had been under investigation since 1980 due to his contact with suspected drug smugglers at the Dalton airport. This contact resulted from the appellant's operation of an aviation business at the airport known as General Aviation. Asked by the state's attorney to provide "specifics of the information thai you've heard about Dr. Felker in regards to this airport and drug smuggling," Jordan replied, "I have seven pages of information leading to Dr. Felker in relations to other proven known drug smugglers." The only specifics Jordan actually offered, however, were that a maintenance man formerly in the appellant's employ had been arrested and indicted by the federal government on drug charges and that certain aircraft known to have been involved in smuggling had landed at Dalton airport and had proceeded to General Aviation while the appellant was present there. Jordan ultimately denied specific knowledge of any direct involvement by the appellant in drug smuggling activities.

With regard to the events leading to the appellant's arrest, Jordan testified that on the night of January 10, 1984, he received a telephone call from a confidential informant to the effect that "the subject we had been looking for for some time was presently at the airport and him and the stuff we were looking for was there, that we needed to get out there quick." Jordan stated that he had known this informant for about 3½ years and that during that time the informant had provided him with information which he (Jordan) had been able to verify. Based on the tip, Jordan and three other law enforcement officers proceeded immediately to the airport, where they observed two cars, a Datsun 280 ZX and a Volkswagen Rabbit, parked in front of the General Aviation building. The Datsun 280 ZX was recognized as having the same appearance as one belonging to the appellant. Jordan then phoned his informant to obtain "a little bit more information," and was informed

specifically that the appellant "was there at General Aviation and was in possession of cocaine." In the meantime, the two automobiles under surveillance in front of the General Aviation office left the vicinity of the airport.

The appellant's car was followed and was observed shortly thereafter parked in front of his medical office, which was the scene of a gathering of several persons. The appellant was subsequently detained as he was attempting to drive away from the office. A search of his person and vehicle resulted in the discovery of a nasal spray bottle containing cocaine, as well as a straw, a surgical knife, and a pocket knife containing cocaine residue. During the course of this search, the appellant stated that he was entitled to possess cocaine and that he had more cocaine in his office. Based on this admission, a warrant was obtained for the search of his medical office. This search resulted in the discovery of three bottles in the appellant's desk drawer labled "Cocaine, Hydrochloride Merck." Two of these bottles contained cocaine. ***Held***:

1. We reject the appellant's apparent contention that a licensed physician is authorized under all circumstances to possess controlled substances. It is unlawful, under the Controlled Substances Act, for "any person" to possess or have under his control any controlled substance, "[e]xcept as authorized by this article." OCGA§ 16-13-30 (a). One such exception, created by OCGA§ 16-13-35 (b), is applicable to persons registered by the State Board of Pharmacy to manufacture, distribute, dispense, or conduct research with controlled substances, "***to the extent authorized by their registration*** and in coformity with this article." (Emphasis supplies.) Pursuant to OCGA § 16-13-35 (g) (2), "[p]ersons licensed as a physician, dentist, or veterinarian under the laws of the state to use, mix, prepare, dispense, prescribe and administer drugs in connection with medical treatment to the extent provided by the laws of this state" are deemed automatically to be registered by the State Board of Pharmacy to do so.

While physicians are certainly given some authority under OCGA § 16-13-35 (b) and (g) (2) to possess controlled substances, we do not interpret this authority to be limitless. Rather, we read the two subsections as authorizing physicians to possess controlled substances to the extent they do so ***as physicians***, i.e., to the extent such possession is for some use connected with their medical practice. To interpret the statute otherwise would be to give physicians **carte blanche** not only to possess controlled substances for their own personal, non-

medical use but also to distribute them to others for non-medical use. Such was clearly not the intention of the Legislature in enacting the statute.

Though criminal statutes are to be construed strictly against the state, they are also to be construed so as to give legislative intent precedence over the literal import of words and to avoid unreasonable or illogical results. See generally ***Bunge*** v. ***State***, 149 Ga. App. 712, 716 (256 SE2d 23) (1979); ***Mitchell*** v. ***State***, 239 Ga. 3 (235 SE2d 509) (1977). In this case, the jury could reasonably have concluded from the state's evidence showing manner of the appellant's possession of the cocaine (viz, its presence on the two knives and the straw and in the nasal spray bottle) that it was being used for purposed unconnected with his medical practice. Consequently, we hold that the conviction was authorized by the statute.

2. It follows from the foregoing that the trial court did not err in denying the appellant's motion to quash the indictment. The indictment was proper on its face in any event, and a motion to quash or dismiss an indictment may not be predicated on extrinsic defects. See generally ***Walters*** v. ***State***, 90 Ga. App. 360, 365 (83 SE2d 48) (1954); ***Walker*** v. ***State***, 73 Ga. App 20 (1), 21 (35 SE2d 391) (1945).

3. The state contends that the appellant waived appellate review of the denial of his motion to suppress by failing to object to the introduction of a crime lab report identifying the seized substances as cocaine. This contention is without merit. In stating that he had no objection to the report, counsel for the appellant obviously did not intend to stipulate either to the legality of the search or to the admissibility of the drugs themselves but merely to the admissibility of the crime lab tests identifying the drugs. It is to the state's advantage to encourage such stipulations, so as to minimize needless expenditure of judicial resources on proof of collateral elements as to which the parties have no bona fide dispute. This objective is not well served by unreasonable attempts to convert such cooperation into a weapon on appeal.

The appelant's failure to object to the admission of the contraband itself during the course of the trial likewise did not constitute a waiver of the motion to suppress. See ***Kilgore*** v. ***State***, 247 Ga. 70 (274 SE2d 332) (1981).

4. The motion to suppress was meritorious and should have been granted. Whether the search is sought to be justified as incident to the appellant's arrest for possession of cocaine or whether it is sought to

be justified by exigent circumstances, it cannot be upheld unless probable cause existed for belief that the appellant was currently in unlawful possession of cocaine Under the standard setforth by the United States States Supreme Court in Illinois v. Gates, _____U.S._____ (51 LW 4709, 4716) (1983), probable cause may be predicated on an informant's tip only if, under the "totality of the circumstances," including the "veracity" and "basis of knowledge" of the informant, there is a "fair probability" that contraband or evidence of a crime will be found in a particular place. Id. at 4716. This test replaces the more stringent two-pronged test enunciated in Aguilar v. Texas, 378 U.S. 108 (84 SC 1509, 12 LE2d 723) (1964) and Spinelli v. United States, 393 U.S. 410) (89 SC 584, 21 LE2d 637) (1969), requiring an informant's tip to be supported by underlying circumstances showing both the informant's reliability and the source of his information. However, the two tests are certainly not mutually exclusive (cf. ***State*** v. ***Stephens***, _____Ga._____ (No. 40184, decided Feb. 6, 1984)), and many of the cases decided under the Aguilar-Spinelli rule consequently remain helpful in assessing whether an informant's tip is sufficient to establish probable cause for a search.

Considering the totality of the circumstances in this case, we find that the information desclosed by Detective Jordan and the other witnesses for the state was totally insufficient to establish reasonable cause for a belief on their part that the appellant was currently in possession of cocaine. In the first place, there was no disclosure of the source of the informant's information. Compare, e.g., ***Parker*** v. ***State***, 161 Ga. App. 37 (288 SE2d 852) (1982) (where the informant had observed the contraband personally). Given the lack of any independent corroboration of the tip, this must be regarded as an extremely significant omission. We reject the argument that such corroboration was provided by the mere observation of the appellant's car in front of the General Aviation building, for in view of the appellant's ownership of General Aviation, this fact was totally consistent with his innocence. Accord ***Rohrig*** v. ***State***, 148 Ga. App. 869 (253 SE2d 253) (1979); ***Radowick*** v. ***State***, 145 Ga. App. 231, 235 (244 SE2d 346) (1978). Compare ***Koza*** v. ***State***, 158 Ga. App. 709 (2) (282 SE2d 131) (1981).

In addition to the lack of any showing of the source of the informant's information, there was also no showing of his or her reliability. It is, of course, well established that such reliability is not established by the mere, unsupported assertion that the informant has provided reliable

information in the past. See ***Kouder*** v. ***State***, 154 Ga. App. 597 (269 SE2d 92) (1980); ***Galgano*** v. ***State***, 147 Ga. App. 284 (248 SE2d 548) (1978); ***Burns*** v. ***State***, 119 Ga. App. 678, 683 (168 SE2d 786) (1969). There being neither any showing of the informant's knowledgeability, nor any showing of his or her veracity, nor any corroboration of the information provided by the informant, we can find no reasonable basis for a belief on the part of the arresting officers that the appellant was in possession of contraband at the time of his arrest. It follows that the state failed to meet its burden of establishing probable cause for the arrest and that the motion to suppress should have been granted.

Judgment reversed. Pope and Benham, JJ., concur.

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No. 84-1514

In The
Supreme Court of the United States
October Term, 1984

THE STATE OF GEORGIA,
Petitioner,
vs.
FORT FRASER FELKER, JR.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED

1. Whether, when a decision is rendered in a state appellate court on state constitutional grounds which meet or exceed federal standards, a federal question is presented.

2. Whether an appellate court may review the evidence presented in a lower court to determine whether probable cause standards have been met.

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THE STATE OF GEORGIA,

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

The Respondent, Fort Fraser Felker, Jr., respectfully prays that the petition for a writ of certiorari to review the judgment of the Supreme Court of Georgia entered in this case on January 23, 1985 denying the Petitioner's application for reconsideration of its denial of Writ of Certiorari to the Court of Appeals of Georgia.

OPINIONS BELOW

The opinion of the Superior Court of Whitfield County, Georgia, is unreported; the opinion of the Georgia Court of Appeals is reported at 172 Ga. App. 492, 323 SE 2d 819 (1984); and the denial of application of Writ of Certiorari of the Supreme Court of Georgia will be noted in 253 Georgia Supreme Court Report.

JURISDICTION

The petitioner has alleged that this Court's jurisdiction is based on 28 U.S.C. § 1257 (c).

STATEMENT OF THE CASE

I. FACTS

The respondent herein, Dr. Fort Fraser Felker, Jr., is a physician licensed to practice medicine in the State of Georgia and registered under standards of the U. S. Department of Justice, Bureau of Narcotics and Dangerous Drugs, to possess "Schedule II controlled substances." Schedule II controlled substances include cocaine (O.C.G.A. § 16-13-26).

On January 20, 1984, Detective Bruce Jordan of the Whitfield County Sheriff's Department received a telephone call at home from an unidentified tipster, stating that "the subject you are looking for is at the airport and has the stuff you're looking for." (T.7). Jordan drove

his car to the Whitfield County Correctional Center, where he asked the dispatcher to radio Detective Ricky Swiney and picked up a patrol car. (Supp. Hearing T.32;T.6). He and his roommate then met Swiney and Sheriff Jack Davis, who had heard the radio message, at a parking lot at the intersection of Walnut Avenue and Airport Road. (T.6,7). They proceeded to General Aviation, a private business located approximately 11 miles from the Correctional Center. (T.7, Supp. Hearing T.29;T.7).

The policemen observed two vehicles parked in front of General Aviation, and noted that the office light was on, and saw no one in the building. (T.8). Jordan and Davis proceeded to the Dalton Municipal Airport, while Swiney remained behind the General Aviation building with Detective Charles Black, who had arrived at the business approximately fifteen minutes after the first policemen. Detective Black was having car trouble, and he and Swiney were using jumper cables in an attempt to restart his patrol car. (T.13-14).

Jordan telephoned his informant from the Dalton Municipal Airport. At that time, the tipster told him that the "subject" was Dr. Felker, the "airport" was General Aviation, and the "stuff" was cocaine, in an unknown amount. (Supp. Hearing T.24;T.8).

While Jordan and Davis were at the Dalton Municipal Airport, and Swiney and Black were behind General Aviation working to start Black's car, the two vehicles parked in front of the building left. (T.14). None of the officers saw the occupants of the cars, nor did they see who, if anyone, left the building. Swiney and Black continued to work on Black's car until it started, but when

they were unable to turn on its lights, Swiney gave Black the jumper cables and drove in the direction in which he had seen the two cars turn. (Supp. Hearing T.39). He caught up with two vehicles at an intersection near the parking lot where the policemen had met. (T.14). He then followed one of the vehicles, later identified as a tan Volkswagen Rabbit, and radioed Officer Donnie Lewallen, asking him to be on the lookout for the other, a brown Datsun 280Z (T.14-15).

Lewallen began surveillance of a brown Datsun 280Z some few minutes later, and followed it to a physician's office—that of Dr. Felker. He drove past the office and parked to watch the car, but did not see who left or entered the Datsun or the office. (Supp. Hearing T.45; T.22). He did notice a group of men gathered in front of the Creative Arts Guild rehearsal hall next door to the office. (T.20, 22). After a short time, the Datsun was driven away from the office. Lewallen again followed the vehicle, and, on Swiney's radioed orders stopped the car. (T.16, 23).

Swiney joined Lewallen almost immediately at the stop. At that time the driver of the car was first identified as being Dr. Felker. (T.17). Swiney asked permission to search the car, and, when consent was not given, undertook a search without consent. Sheriff Davis had arrived at the stop, as had Detectives Charles Hayes and Debbie Duvall. (T.17).

Dr. Felker at this time pulled a small vial containing cocaine from his pocket. He dropped the vial, picked it back up, and gave it to Swiney, explaining that it contained cocaine, that he was a doctor licensed to possess

cocaine, and that there was more cocaine at his office. The vial had became uncapped when it was dropped and residue had been blown onto Dr. Felker's clothing and onto the ground nearby. (Prelim. Hearing T.7; Supp. Hearing T.50;T.18-20).

Swiney formally placed Dr. Felker under arrest at this time, and had him transported to the Correctional Center. (T.18). Hhe called a County Magistrate, obtained a search warrant for Dr. Felker's office, and supervised a search of the office. Three brown glass containers labeled Cocaine Hydrochloride Merck" were found at the office (T.19); crime lab analysis showed these to contain or have contained cocaine, and order forms introduced into evidence by the State at the trial of the case showed legitimate, legal purchase and possession of same. (State's Exhibits Nos. 1 and 2).

After Dr. Felker's arrest, certain items were found on his person which, when tested by the State Crime Lab, were found to be "positive for cocaine." No items found in the automobile were shown to have contained cocaine; the "short straw" referred to by the Petitioner (T.18) was not even *sent* to the crime lab for testing, and was not introduced into evidence at trial. (State's Exhibit 1).

Various motions were filed by Dr. Felker through Counsel, including Motions to dismiss the indictment, quash the search warrant, and suppress all evidence gathered in an illegal search of the automobile. The motions were denied, and Dr. Felker was tried and found guilty of a violation of the Georgia Controlled Substance Act.

On appeal the Georgia Court of Appeals reversed the trial court's denial of the respondent's Motion to Sup-

press. The Supreme Court of Georgia denied certiorari; it is from this denial of certiorari that the Petitioner has now petitioned this Court for certiorari.

REASONS FOR DENYING THE WRIT

I.

No Federal Question Is Presented In This Matter.

The Constitution of the State of Georgia provides that "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue except upon probable cause. . . ." Const. Ga. Art. 1, § 1, Para. 13. On appeal, the Respondent cited this passage as grounds for his appeal, along with those of the Fourth Amendment to the United States Constitution. The Georgia Court of Appeals reversed the trial court judgment with reliance on *State v. Stephens,* 252 Ga. 181, 311 S.E. 2d 823 (1984), which Georgia Supreme Court opinion had construed and applied the new federal standard of *Illinois v. Gates,* — U.S. —, 103 S.Ct. 2317, 76 L. Ed.2d 527 (1983), as it would apply to and affect Georgia cases. The indictment came under a Georgia statute; Respondent's appeal was made on Georgia's constitutional grounds, and the Georgia Court of Appeals made its decision based on Georgia law.

This Court has often emphasized that State courts are free to set higher standards for protection of its citizens and greater restrictions on police powers, so long

as the standards set do not fall below federal constitutional standards. See *Michigan v. Moseley,* 423 U.S. 321, 96 S.Ct. 321, 46 L. Ed.2d 313 (1975); *Texas v. White,* 423 U.S. 67, 72, 96 S.Ct. 304 (1975); *Oregon v. Hass,* 420 U.S. 714, 95 S.Ct. 1215 (1975); *Lego v. Twomey,* 404 U.S. 477, 92 S.Ct. 619, 30 L. Ed.2d 618 (1972). More recently, this Court dismissed as improvidently granted a writ of certiorari on the ground that the court below had rested its suppression decision on independent and adequate state grounds. *Florida v. Casal,* 462 U.S. 637, 103 S.Ct. 3100, 3103, 77 L. Ed.2d 277 (1983). A state search, in a state court, must adhere to state standards as well as federal standards. If state standards are more restrictive than the federal standards, a search and seizure not in compliance with the state standards must fall, even though it might meet threshold federal requirements.

The Georgia Supreme Court addressed this very question in *State v. Stephens,* 252 Ga. 181, 311 S.E.2d 823 (1984). There the court adopted the rule of *Illinois v. Gates* as the *outer limit* of probable cause, noting the subjectivity of the rule and urging a maximum indication of reliability for affidavits supporting a search.

In the present case, the Georgia Court of Appeals clarified the Georgia standard of probable cause. Citing the *Stephens* opinion, it has reasserted that the "totality of the circumstances" will determine probably cause or lack thereof, but has also provided the basis for an objective means of looking at the totality of circumstances. The court noted that cases decided under the Aguilar-Spinelli line of reasoning were *helpful* in reviewing a case, not *controlling.* The reasoning employed by the Georgia Court of Appeals affirms to Georgia law enforcement officials that, if Aguilar-Spinelli requirements are not met,

there must be something concrete in the circumstances surrounding a search and seizure to justify such police action. The rule of *Illinois v. Gates* must not be abused in such a way as to allow law enforcement officials to rely on hearsay, rumor and innuendo, rendering the Fourth Amendment useless. The Georgia Court of Appeals has ruled that, as to state cases, it will require something more than a nebulous feeling to justify a search and seizure. The Georgia Supreme Court, by denying certiorari, has agreed that the *Illinois v. Gates* rule, as applied to Georgia cases, will not be abused.

The Georgia Court of Appeals has, in fact, followed exactly the line of reasoning set out by this Court in *Illinos v. Gates*, — U.S. —, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), considering the Aguilar-Spinelli factors as "closely intertwined issues that may usefully illumine the commonsense, practical question whether there is "probable cause" to believe that contraband or evidence is located in a particular place." 103 S.Ct. at 2328.

II.

The Appellate Court Properly Reviewed The Decision Of The Trial Court To Prevent Misinterpretations Of Law And Abuses Of Discretion.

The Petitioner herein has submitted to this Court that the Court of Appeals of the State of Georgia erred by refusing to agree with the trial court's finding of probable cause. It is settled that the function of an appellate court is to review decisions of lower courts, correcting errors of law and ensuring that parties are afforded basic protections of the law. In this matter, the Georgia Court

of Appeals has fulfilled this function setting out and clarifying the law relating to probable cause, applying the facts of the case to the law, and rendering a decision in conformity thereto. When the trial court's finding of probable cause is erroneous, the appellate court's duty is to correct its error.

CONCLUSION

This case was properly decided in the court below and is not an appropriate case for the granting of certiorari by this Court. For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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